IN THE

Supreme Court of the United States

October Term, 1979

No. 79-190

GENERAL ATOMIC COMPANY,

Petitioner,

—against—

UNITED NUCLEAR CORPORATION and INDIANA & MICHIGAN ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

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BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

General Atomic Company's ("GAC") petition seeks to review the judgment of the Supreme Court of New Mexico, entered May 7, 1979, affirming a "partial final judgment" entered by the District Court for the First Judicial District, Santa Fe County, New Mexico. That judgment denied GAC's motion to stay, pending arbitration, the trial of that part of the action that related to controversies between GAC and United Nuclear Corporation ("UNC"). The petition fails to furnish any basis to interfere with the proceedings below, especially as they involve or affect this Respondent.

Question Presented

So far as the petition relates to Indiana & Michigan Electric Company ("I&M"), we submit that it raises only one question:

> Whether Petitioner is now entitled to have a judgment obtained against it by this Respondent set aside because of a controversy involving arbitration with another party which in no way involves this Respondent, as Petitioner's conduct below clearly demonstrated.

Counterstatement of the Case

I&M submits that the petition for certiorari should be in all respects denied for the reasons fully set forth in UNC's brief in opposition, and specifically on the ground that the New Mexico Supreme Court correctly determined that GAC consciously waived any claim to arbitration here pertinent. We focus in this opposition brief on a point not discussed in either GAC's petition or in UNC's brief in opposition, namely, the fact that, regardless of the merits of GAC's claims to a right to arbitration against UNC, GAC has no right to any relief which in any way casts doubts upon the rights of I&M, which has no agreement or obligation to arbitrate its claims with anyone and against which no stay was ever sought in any court. Under these circumstances, we submit, any grant of certiorari should at the very least expressly exclude this Respondent from its operation.

I&M is an innocent bystander to the controversy involved in the present petition and it should not be enmeshed in proceedings involving that controversy. GAC has conceded that it has no basis to arbitrate its controversy with I&M. GAC's motion of November 30, 1977 for a stay of proceedings in the district court explicitly excluded "the

issues of GAC's and UNC's obligations to . . . Indiana and Michigan" from the matters sought to be stayed and arbitrated. Although GAC thereafter made repeated motions in the New Mexico Supreme Court for a stay of its trial with UNC, GAC never asked for a stay of the trial of I&M's claims. As recently as March 30, 1978, after the District Court had entered an order granting a partial default judgment against GAC, including all issues of liability, GAC recognized that it had not sought to include I&M in its efforts to stay its trial with UNC when it told the New Mexico Supreme Court in its Reply to I&M's Answer Brief:

> "[T]his appeal at this time raises neither the question of whether GAC is entitled to a stay of the issues between itself and I&M pending arbitration between GAC and UNC, nor the validity of any proceedings subsequent to the orders appealed from, nor the question of whether a judgment obtained by I&M, or any portion of such a judgment, is reversible because GAC was denied the opportunity to seek a stay of proceedings or take other action in the Court below." GAC Reply to I&M Answer Brief at 1, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S.Ct., May 18, 1979).

Only on June 30, 1978, after a final judgment and decree had been entered in favor of I&M,[1] did GAC assert in a supplemental brief that the New Mexico Supreme Court must return all parties, including I&M, to the *status quo ante* April 2, 1976,[2] i.e., vacate *inter alia,* the judgment

1. The District Court entered its "final judgment" in *United Nuclear Corp.* v. *General Atomic Co.* on May 17, 1978. A separate appeal from that judgment is now *sub judice* in the New Mexico Supreme Court.

2. On April 2, 1976 I&M was litigating its dispute with Gulf and GAC in the Southern District of New York. After Gulf and GAC procured the dismissal of that action in December, 1976, I&M was joined as a party defendant in the then pending Santa Fe action. See pp. 5-6, *infra.*

in favor of I&M. The New Mexico Supreme Court properly rejected this belated and unjustified suggestion.

It would seem, therefore, so far as the instant petition concerns I&M, that GAC raises no question worthy of consideration or even remotely relevant to I&M's claims (or bearing on the judgment I&M subsequently obtained), because either:

> (a) GAC never properly sought such relief against I&M in the state court; or
>
> (b) there was an independent and adequate state ground on which the New Mexico Supreme Court denied GAC's application that proceedings vis-a-vis I&M be restored to the *status quo ante* April 1976, namely, that GAC's application—belatedly made in the New Mexico Supreme Court on June 30, 1978, after entry of the final judgment by the District Court—necessarily involved an exercise of discretion by the New Mexico Supreme Court over a purely ancillary matter. Such an afterthought, after all proceedings had moved forward to judgment without any such reservations or comments, was plainly unworthy of serious consideration there and is certainly unworthy of review here.

Nevertheless, without any discussion of I&M's status, or frank disclosure of its remoteness from the issues on which the petition is really based, GAC asks this Court to reverse *all* portions of the order and judgment below and restore the *"status quo ante"* (Pet. at 36-38) which carries with it a disguised suggestion that this Court should also vacate the judgment obtained by I&M. Therefore, we address GAC's petition at somewhat greater length than is warranted by its merits, so that this Court will clearly observe the inappropriateness of any review of the decision below insofar as it relates to I&M, which was in no way involved

in the arbitration controversy upon which petitioner principally relies in its present petition.

Background

We do not extend this brief by any discussion of the initial procedural history of the present action for two reasons: *first,* I&M did not become involved in the New Mexico action until January 21, 1977 when it was made a party defendant on GAC's motion; and *second,* the pertinent facts appear to be accurately set forth in UNC's brief in opposition.

I&M's litigation with GAC began in February 1976, when I&M brought an action to enforce its contract for the supply of fabricated uranium fuel assemblies and uranium concentrates against GAC and its constituent partner, Gulf Oil Corporation ("Gulf"), in the United States District Court for the Southern District of New York. *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp.,* No. 76 Civ. 881 (S.D.N.Y., filed Feb. 24, 1976). Over I&M's objection, Gulf and GAC procured the dismissal of that action in December 1976 on their representations that I&M's claims should and could be tried speedily in the contract action then pending in the New Mexico state court between GAC and UNC where all proper parties, including particularly UNC, would be present and any risk to GAC of inconsistent judgments could be avoided. Transcript of Proceedings, December 21, 1976 at 2-3, *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp., supra.* Upon the dismissal of the action in the Southern District of New York, GAC moved to add I&M as a defendant in the New Mexico state action already pending between UNC and GAC.[3] Although GAC and Gulf

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3. *United Nuclear Corp.* v. *General Atomic Co.,* No. 50827 (Santa Fe County, filed Dec. 31, 1975) was brought by UNC in December 1975 in the New Mexico state court.

were aware that I&M was pressing for a prompt trial, they made no suggestion, in seeking dismissal in New York, that they had any intention other than to try their controversy with I&M in the state court. They evinced no intent to seek to stay that action pending any arbitration with UNC. In fact, a separate arbitration proceeding between UNC and GAC (to say nothing of Gulf) would have been inconsistent with GAC's stated purpose in seeking to have the New York federal action dismissed in favor of a single proceeding in the New Mexico state court. GAC concededly had no basis to arbitrate any controversy it had with I&M. Thus, if it were to arbitrate its controversy with UNC, it would, of necessity, be opting for a bifurcated proceeding—arbitration with UNC and a state court trial against I&M—with the possibility of inconsistent results, the very thing it claimed it wanted to avoid by successfully moving to dismiss the New York federal action and join I&M in the pending New Mexico state court action.

Anticipating speedy progress to trial in New Mexico, I&M did not oppose joinder in the Santa Fe state court action; it joined in the then ongoing discovery and in its answer asserted claims against both Gulf and GAC. In May, 1977, responding to a motion by GAC to enlarge the discovery period, the trial court scheduled trial for October 31, 1978. The trial commenced as scheduled.

On October 31, 1977, this Court announced its decision in *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977). On November 30, 1977, GAC filed a motion in the state district court to stay the trial of its controversy with UNC, pending arbitration. GAC's stay motion explicitly stated that "At this time no stay is being requested of the proceedings on the issues of GAC's and UNC's obligations to Detroit Edison and Indiana & Michigan Electric Co. . . ." GAC also filed a demand for arbitration with the American Arbitration Association ("AAA") which contained the same

express exclusions.[4] By orders entered on December 16, 1977 and December 27, 1977, respectively, the state court granted UNC's cross-motion for a stay of arbitration on the ground, *inter alia,* that GAC had waived its arbitration rights and denied GAC's motion for a stay of trial proceedings.[5] In the meantime, the trial continued.

On January 5, 1978 GAC moved in the New Mexico Supreme Court for interim relief from the trial court's denial of its stay motion. The New Mexico Supreme Court denied GAC's motion on January 13, 1978. On January 26, 1978, GAC requested that the New Mexico Supreme Court stay the trial pending GAC's petition to this Court (which was never filed) with respect to the New Mexico Supreme Court's January 13, 1978 order. The New Mexico Supreme Court denied this request on February 1, 1978. On February 27, 1978, GAC filed its main brief on the appeal from the trial court's orders denying a stay of the trial as to UNC in the New Mexico Supreme Court. Once again, GAC ignored the status of its dispute with I&M in favor of arguments couched exclusively in terms of its dispute with UNC, but sought as relief stay of "the trial". However, as we have discussed at p. 3 *supra,* after I&M pointed out that GAC had never asked the district court to stay the trial of I&M's disputes with GAC and had no basis for such a request, GAC conceded that no stay of proceedings as to I&M had been or was then being requested. GAC Reply to

4. This was consistent with both GAC's position in the Southern District of New York that it wanted to try its entire controversy with respect to I&M's contract in a single forum, and the fact that I&M has no agreement to arbitrate with anyone.

5. The December 16, 1977 order staying arbitration is the decision of the trial court on remand which this Court directed be vacated by its order in *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978), discussed *infra.* However, this Court declined "to disturb" the trial court's December 27, 1977 order refusing to stay the trial (436 U.S. at 498 n. 2) which is the very order that, as affirmed by the New Mexico Supreme Court, GAC seeks in its instant petition to have this Court review.

I&M Answer Brief at 1, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S. Ct., May 18, 1979) (quoted at p. 3, *supra*).

On May 30, 1978 this Court issued its decision on GAC's mandamus application[6] in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), in which this Court explicitly refused to "preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate" or to "prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97. At GAC's request, the New Mexico Supreme Court thereupon invited supplemental advice on the effect of that decision on the pending appeals from the trial court's orders and partial judgment. In its June 30, 1978 Supplemental Brief, GAC argued for the first time that, in view of this Court's decision, the only appropriate remedy was to restore the *"status quo ante"* by vacating all orders of the New Mexico courts subsequent to April 1976. GAC Supplemental Brief at 6, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S. Ct., May 18, 1979). GAC asserted in a footnote to that brief:

> "The fact that I&M, which has no agreement to arbitrate with GAC, is now a party to this action does not affect GAC's right to this relief. The decisions construing the Federal Arbitration Act have consistently held that a third party such as I&M, whose claims are intertwined to a substantial degree with arbitrable questions, must await the outcome of the arbitration before securing judicial consideration of the issues that remain in dispute. See, ***e.g., Lawson Fabrics, Inc.* v. *Akzona, Inc.*,** 355 F. Supp. 1146, 1151 (S.D.N.Y. 1973); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368, 369 n.2 (1st Cir. 1968); *C. Itoh & Co., Inc.* v. *Jordan Int'l Co.*, 552 F.2d 1228, 1231 (7th Cir. 1977). Moreover, I&M was impleaded in this action only after GAC was foreclosed, by Judge Felter's unconstitutional order, from joining UNC as a party to I&M's action against GAC in the United States District Court for the Southern District of New York. Hence its very presence in this lawsuit is directly traceable to the unlawful order." (*Ibid.*)

6. On March 3, 1978, GAC had filed an application for leave to file a mandamus petition attacking Judge Felter's orders of December 16, 1977 and December 27, 1977.

The New Mexico Supreme Court rejected this belated argument *sub silentio*, and properly so, since it was clearly erroneous. Not only did the cases cited by GAC fail to support its position,[7] but, regardless of its motives in bring-

7. Each case involved a plaintiff who had invoked a judicial forum to try with one defendant a dispute as to which it had an agreement to arbitrate and who brought into its action a second defendant (as to which no right to arbitrate existed) in an attempt to defeat the first defendant's right to arbitrate. The three courts recognized that the mere presence of such a third party, brought in by the party resisting arbitration, could not defeat the other party's right to arbitration or to a stay pending arbitration. That, of course, is not the case here since it was GAC, the party now allegedly seeking to arbitrate, which brought I&M into this action to try out concededly non-arbitrable claims. Moreover, as I&M pointed out to the New Mexico Supreme Court, courts have consistently recognized that there is no right under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1976), to a stay of trial as to persons who are not parties to an arbitration agreement, but that such a request is a matter to be decided by the court in its discretion, considering familiar principles of judicial economy. *See, e.g., Nederlandse Erts-Tankersmaatschappij, N.V.* v. *Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964); *cf. Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), where Justice Cardozo wrote:

> "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. . . . Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."

An exercise of such discretionary power of judicial management raises no federal question and does not call for review by this Court.

ing I&M into the Santa Fe district court initially, it had made every effort, right up to and well past the day of final judgment, to keep I&M in that court and to continue the trial of its dispute with I&M without interruption and without waiting for the result of its arbitration controversy with UNC. For example, GAC's arbitration demand in San Diego, dated November 29, 1977, stated:

> "It is GAC's desire that to the extent possible any disputes between GAC and UNC regarding the meaning of the utility contracts or GAC's obligation under those utility contracts be resolved in appropriate forums where the representative utility, GAC and UNC are all present." Petition for Writ of Mandamus at 43a, *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978).

That GAC changed its mind as to its preferred procedure well after an adverse judgment had been rendered gives it no right, much less a federally protected right, to go back and start over.

Argument

Except for a few casual references in the statement of facts, the present petition completely ignores not only I&M's role in this case, but I&M's rights in the action as to which review is sought, and the unique circumstances which led to I&M's presence in this case. In view of GAC's repeated recognition that it has never sought any stay of its litigation with I&M, together with the fact that it brought I&M to New Mexico for the express purpose of avoiding inconsistent results by trying out its dispute with I&M along with UNC in the New Mexico state court, it would be highly inappropriate to allow this application for certiorari to prejudice I&M's rights, including I&M's judgment.

What GAC appears to be asserting, and the construction it may urge, absent a careful delineation by this Court of

the scope of its determination,[8] is that, *assuming arguendo* the New Mexico court should have stayed the trial of the controversy between GAC and UNC in favor of arbitration, then it follows as a matter of federal law that all proceedings in the state courts subsequent to April 2, 1976—including the trial and judgment in the controversy between GAC and I&M—are a nullity regardless of the facts that:

> (1) I&M has no agreement to arbitrate with anyone;
>
> (2) GAC has never claimed any right to arbitrate any dispute it may have with I&M, contractual or otherwise;
>
> (3) GAC never sought a stay of trial of its dispute with I&M but instead explicitly excepted that dispute from its application for a stay and arbitration vis-a-vis UNC;
>
> (4) GAC obtained dismissal of I&M's New York federal court action by representing that it wanted a "unitary adjudication" of its disputes with I&M and UNC in the New Mexico court and then voluntarily joined I&M as a party before the New Mexico court with the express purpose of trying there its disputes with I&M and UNC;
>
> (5) GAC, by its answer to UNC's complaint, explicitly negated any intent to arbitrate its dispute with UNC regarding those questions which underlie its dispute with I&M; and
>
> (6) GAC never suggested that its attack on the trial court's December 16, 1977 and December 27,

8. GAC's proclivity to adopt expansive and erroneous readings of the language of this Court's decisions is illustrated by the suggestion it now makes in its petition (at 32) that, in spite of this Court's express language recognizing the jurisdictional power of the New Mexico courts to determine whether or not GAC had waived arbitration and whether or not GAC was entitled to a stay of the pending trial (436 U.S. at 496-97), it was nevertheless a violation of the mandate of this Court for the state courts to decide either of these issues as they did. We find nothing of the kind in this Court's mandate.

> 1977 orders raised any question of I&M's right to proceed with its action against GAC until after the trial court's final judgment was entered against GAC on I&M's claim.

Certainly, there is nothing in the language or the spirit of this Court's previous determinations which would suggest that this Court intended to prejudice I&M's right to a speedy trial and judgment, and a present interpretation of those rulings in a way which did so would be completely unfair and unjustified.

Insofar as this petition may be deemed to raise questions regarding the validity of the final judgment in favor of I&M entered by the state trial court and now on appeal to the New Mexico Supreme Court, it raises no genuine federal question at all, much less one warranting review on certiorari. GAC's ambiguous and veiled attack on the judgment of the New Mexico Supreme Court cannot properly be permitted to adversely affect I&M's rights, and if an intent to produce such an effect is lurking in GAC's obscure appeals to restore the *"status quo ante"*, it should be rejected.

We respectfully submit that obscure and unsupported claims unworthy of review should not be allowed to slip through so that they may later be claimed to be involved when care in framing the writ will limit review to subjects deserving of it, if there be any. While we believe that the instant petition should be in all respects denied, if this Court should find any matter raised to be worthy of certiorari, we submit that it is especially important here to apply the well-established principle that certiorari should be carefully restricted to those specific issues which are themselves deserving of consideration on certiorari. *See, e.g., New York City Transit Authority* v. *Beazer,* 438 U.S. 904 (1978); *Mobil Oil Corp.* v. *Higginbotham,* 434 U.S. 816 (1977); *Montana Power Co.* v. *United States EPA,* 430 U.S. 953 (1977); *Alabama Power Co.* v. *Davis,* 429 U.S. 1037

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Conclusion

For the reasons fully set forth in UNC's brief in opposition, with which we concur, GAC's petition for certiorari should be in all respects denied. For the reasons set forth in this brief, insofar as this petition may be construed as in any way involving any right of I&M, including the validity of the final judgment of the New Mexico trial court in favor of I&M against GAC, the appeal of which is now *sub judice* in the New Mexico Supreme Court, it should be expressly denied.

Respectfully submitted,

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